No. 95-590

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Petitioner,

v.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC., AND BILLY GRUBBS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents cannot seriously dispute that Mercedes' conduct in this case was at the core of the First Amendment right protected by the *Noerr-Pennington* doctrine: petitioning an administrative agency for an interpretation and enforcement of the law. Faced with competing claims to its automobile dealership, Mercedes chose — reasonably and in good faith — to seek an adjudication of its legal rights and obligations before the Florida DMV to resolve the ownership dispute. The only alternative for Mercedes was to allow the *automatic* transfer of the dealership under Florida law to Taylor, which might very well have been unlawful because of the competing interests of Smith and Cutler.

Solely because Mercedes filed a state administrative complaint, however, a divided panel of the Eleventh Circuit held — over a properly raised *Noerr-Pennington* defense — that Mercedes is liable for more than ***$15 million*** in damages. Contrary to respondents' suggestions, Mercedes engaged in no "improper[] obstruct[ion]" (MSP Br. 1) or any other "refusal to recognize" the transfer to Taylor (Taylor Br. 11) — apart from the filing of a DMV complaint. And, as Mercedes has demonstrated (Pet. 16-17), at the time it filed its DMV complaint the law was unclear whether the Automobile Dealer's Act allowed an objection to a dealership transfer for reasons other than the transferee's "qualifications." Mercedes' DMV complaint was no "sham" to disguise an effort to disrupt the dealership transfer to Taylor. The Eleventh Circuit expressly concluded that Mercedes filed its complaint to avoid "potential lawsuits brought by either Cutler or Smith." Pet. App. 6a.

The First Amendment and this Court's *Noerr-Pennington* doctrine will not permit a party to be penalized with a huge damages award merely because it sought, in good faith, a state administrative declaration of its legal obligations rather than acquiescing in a possibly illegal franchise transfer. Review by this Court is plainly warranted to correct this gross constitutional error and to clarify the scope of the *Noerr-Pennington* doctrine, which respondents do not dispute has been the subject of conflicting lower court decisions.

Moreover, despite Taylor's bald assertion to the contrary (Br. 21), it would not have been necessary to reach these important federal questions if the Eleventh Circuit had held, as Mercedes urged, that Taylor lacked standing to bring a claim under the Automobile Dealer's Act and that Mercedes had not "violated" that Act by filing a complaint with the DMV. Instead, the panel — over a dissent by Judge Hill — failed to certify these novel questions to the Florida Supreme Court and proceeded to decide them incorrectly. At the very

minimum, a remand to the Eleventh Circuit with instructions to certify these questions is necessary.

A. Mercedes Has Raised A Valid *Noerr-Pennington* Claim

Respondents have made a variety of procedural and substantive objections to Mercedes' First Amendment claim, none of which can withstand even minimal scrutiny.

1. As a threshold matter, MSP makes the halfhearted assertion that Mercedes somehow "waived" its *Noerr-Pennington* defense by failing to raise it properly in the courts below. MSP Br. 5. MSP acknowledges, however, that Mercedes presented its *Noerr-Pennington* claim in both the district court and the Eleventh Circuit. MSP Br. 5-6. For its part, Taylor makes no such assertion and concedes that Mercedes raised this claim in the Eleventh Circuit, which rejected it as "completely meritless." Taylor Br. 8.

In fact, Mercedes properly preserved its First Amendment defense in the courts below, raising it first in its answers to the MSP complaint and the Taylor counterclaim in the district court. R. 1-8; Pet. 10. On motions for partial summary judgment, the district court held that Mercedes' First Amendment claim was no defense to liability under Section 320.643. R. 29-405, R. 31-214. The issue was then fully briefed to the Eleventh Circuit, which (as Taylor concedes (Br. 8)) decided the issue on the merits.

2. Taylor argues without citation (at 6) that "basic principles of *res judicata*" somehow precluded Mercedes from raising its *Noerr-Pennington* defense in federal court because that defense was not raised during a prior appeal to the Florida District Court of Appeal of the DMV's dismissal of Mercedes' administrative complaint. But Mercedes had no reason to present a First Amendment issue in the state proceedings, and neither the DMV nor the court of appeal had any reason to adjudicate a *Noerr-Pennington* claim, because those proceedings did not involve a suit for damages. This damages action under Section 320.697 was filed by

respondents only *after* the DMV and the court of appeal had ruled on Mercedes' objections to the proposed transfer to Taylor.

3. Respondents attack the merits of Mercedes' *Noerr-Pennington* claim by asserting that it was not the act of filing an administrative complaint (*i.e.*, "petitioning" activity) that subjected Mercedes to massive damages liability, but rather some other "unlawful" "refusal to recognize the dealership transfer." Taylor Br. 11; see MSP Br. 17 (citing Mercedes' "actions in refusing to recognize the transfer"). Respondents, however, cannot point to any action by Mercedes other than its filing of a DMV complaint challenging the Taylor transfer. Indeed, Mercedes did nothing other than file a complaint with the DMV to resolve a complicated ownership dispute over its franchise. To achieve this goal, Mercedes joined all of the relevant parties to the proceedings — MSP, Taylor, Smith, and Cutler — so that the issue could be resolved once and for all in one forum. P. Ex. 93; R. 29-203, 29-208.

Even if it had wanted to do so, Mercedes could have done nothing to delay or obstruct the transfer other than file a DMV complaint. If Mercedes had not filed its complaint for a determination of the lawfulness of the transfer to Taylor, the transfer would have been effected automatically by operation of Section 320.643(2)(a),[1] thereby subjecting Mercedes to potential liability to either Smith or Cutler. As the Eleventh Circuit expressly found, Mercedes filed its complaint against the transfer "on the ground that by approving the transfer it would open itself up to potential lawsuits brought by either Cutler or Smith, each claiming to be the

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[1] After the DMV granted MSP's motion to dismiss Mercedes' complaint, the transfer of the dealership to Taylor "took place by operation of law." *Mercedes-Benz of North Am., Inc.* v. *Mike Smith Pontiac, GMC, Inc.*, 561 So.2d 620, 624 (Fla. Dist. Ct. App.), rev. denied, 574 So.2d 142 (Fla. 1990).

rightful dealer." Pet. App. 6a; see also *Mercedes-Benz*, 561 So.2d at 624.

Indeed, the Eleventh Circuit relied on the decision by the DMV rejecting Mercedes' complaint for lack of jurisdiction, and its affirmance on appeal, in holding that the issue whether Mercedes had "violated" Section 320.643 by filing a complaint was *res judicata*. Pet. App. 9a-12a. Thus, it is undisputed that the filing of Mercedes' administrative complaint was the *sole* basis for the court's liability holding.

In the final analysis, respondents engage in mere semantics by arguing that the damages in this case were based on Mercedes' "refusal" to approve a dealership transfer rather than on Mercedes' seeking administrative and judicial review. Under Florida law, the only way Mercedes could have avoided a transfer was by filing an administrative complaint to obtain a determination of its rights. That is the only basis for Mercedes' huge liability in this case, which (as we have shown (Pet. 13-17)) is repugnant to the First Amendment.

4. Respondents also repeatedly assert that Mercedes filed its administrative petition in bad faith, as a sham to obstruct the transfer of its dealership to Taylor. Thus, MSP states at the outset of its brief (at 1) that "Mercedes attempted to give excuse and cover its illegal actions by filing a complaint with the Florida [DMV]." See also Taylor Br. 11-12 (citing Mercedes' act of filing a "meaningless," "inoperative," and "legally useless" complaint). Respondents, of course, have the burden of proving that Mercedes' complaint was a "sham" (*Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920, 1928 (1993)), and no court has yet so found.

Contrary to respondents' unsupported assertions, the record in this case is clear that Mercedes filed its DMV complaint in good faith because it was unsure whether Taylor was a bona fide transferee for purposes of Section 320.643 when neither Smith nor Cutler, who claimed interests in the

dealership, had consented to the transfer. The precise situation confronting Mercedes was not specifically addressed by Section 320.643 or any other section of the Automobile Dealer's Act.[2] Accordingly, Mercedes concluded that Florida law gave it no reasonable alternative but to file a complaint against the proposed MSP-Taylor transfer and join Smith and Cutler as parties to the proceeding so that all interested parties could assert their claims in one forum.

The DMV and the Florida District Court of Appeal subsequently held that the DMV had no jurisdiction to adjudicate Mercedes' action because its complaint did not challenge Taylor's moral character or business experience. Pet. 9-10. But the Florida appellate court did not cite any precedent for this holding and expressly noted that there may be other grounds for a challenge to a franchise transfer not enumerated in the statute. See 561 So.2d at 624; Pet. 10. Mercedes' DMV complaint was therefore not "objectively baseless," *Professional Real Estate Investors*, 113 S. Ct. at 1923, when it was filed.

In any event, the Eleventh Circuit expressly found that Mercedes filed its complaint only to protect itself from "lawsuits brought by either Cutler or Smith, each claiming to be the rightful dealer." Pet. App. 6a; see also *Mercedes-Benz*, 561 So.2d at 624.[3] Mercedes' administrative litigation was thus instituted entirely in good faith (hence the jury's decision not to award treble damages in this case), and respondents have offered no proof to the contrary.

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[2] Judge Hill in his dissent in this case described the statute as "obscure and unclear." Pet. App. 17a.

[3] MSP is clearly incorrect in its (literally) boldfaced assertion (at 7) that "[n]owhere did the Florida appeals court or the Eleventh Circuit make such a finding" on Mercedes' reason for filing a complaint with the DMV.

B. Respondents Do Not Seriously Dispute The Disarray In The Lower Courts On The Scope of The *Noerr-Pennington* Doctrine

The Eleventh Circuit treated Mercedes' First Amendment claim as "meritless" (Taylor Br. 8) in response to an argument by MSP that the *Noerr-Pennington* doctrine was inapplicable to this case. MSP now tries to suggest (at 4) that it never made that argument to the Eleventh Circuit and that Mercedes has "misinterpret[ed]" a "phrase" from a sentence in its brief. In fact, however, the entire sentence from the section of MSP's brief entitled "The Noerr-Pennington Doctrine Does Not Apply To This Case" reads: "This doctrine, however, applies only to litigation involving business relationships between competitors and anti-competitive activities covered under state and federal statutes." Answer and Reply Brief of the Appellant, Mike Smith Pontiac, GMC, Inc. 25-26. There can be no doubt about MSP's position on Mercedes' First Amendment defense.

Taylor tries to avoid the issue by suggesting that it (as opposed to MSP) "never argued to the court of appeals that the *Noerr-Pennington* doctrine was limited to antitrust cases" (Br. 10). Although that point is irrelevant in light of MSP's clear position below, Taylor then proceeds to make the very argument (at 14) that it claims to eschew: "the *Noerr-Pennington* doctrine is not implicated by petitioning activities which are 'more economic than political in nature.'" Indeed, Taylor quotes from an Eleventh Circuit case, *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991), that convincingly demonstrates the cramped view of the *Noerr-Pennington* doctrine in that circuit and the confusion in the lower courts over this issue.

In *Todorov*, the court described the *Noerr-Pennington* doctrine only as "immuniz[ing] from antitrust liability anticompetitive activity that consists of petitioning a governmental agency to obtain favorable legislation." 921 F.2d at 1446 n.14. The court refused to apply the doctrine to

lobbying activities by physicians seeking to prevent a colleague from receiving radiology privileges at a hospital, finding those actions "more economic than political in nature." *Ibid.*

The decision by the Eleventh Circuit in *Todorov*, which it followed in this case, conflicts directly with this Court's admonition in *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511 (1973), that the First Amendment right recognized by the *Noerr-Pennington* doctrine allows a party to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." Indeed, the First Amendment right to petition government agencies for redress encompasses the institution of litigation that seriously affects substantive (and legally protected) economic interests of other parties. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 742-743 (1983).

Unlike the Eleventh Circuit here and in *Todorov*, several other circuits have applied the *Noerr-Pennington* doctrine outside of the antitrust context to "reject[] claims seeking damages for injuries allegedly caused by the defendants' actions directed to influencing government action." *Brownsville Golden Age Nursing Home, Inc.* v. *Wells*, 839 F.2d 155, 160 (3d Cir. 1988); see, *e.g.*, *Havoco of Am., Ltd.* v. *Hollobow*, 702 F.2d 643, 650 (7th Cir. 1983) (defendants prompted SEC investigation); *Suburban Restoration Co.* v. *ACMAT Corp.*, 700 F.2d 98, 102 (2d Cir. 1983) (defendant sought injunction against award of public contract).

As we have demonstrated (Pet. 17-21), many lower courts have struggled to define the scope of the First Amendment protection extended by the *Noerr-Pennington* doctrine. See *Whelan* v. *Abell*, 48 F.3d 1247, 1253-1254 (D.C. Cir. 1995) (noting tension in the case law but declining to "set forth any kind of encyclopedic position on the relation

between the common law torts at issue here and the *Noerr-Pennington* doctrine — or between them and the First Amendment regardless of the idiosyncracies of *Noerr-Pennington*"). This case presents this Court with an opportunity to resolve the conflicts and confusion in the lower courts on this important issue.

Tellingly, respondents do not seriously dispute the conflict in the lower courts on the scope of the *Noerr-Pennington* doctrine. Instead, they argue that review should not be granted in *this* case because the Eleventh Circuit did not discuss the *Noerr-Pennington* issue in rejecting Mercedes' claim. Taylor Br. 10; MSP Br. 3-7. But the court below needed little discussion in light of the arguments presented by respondents and its prior ruling in *Todorov*. Thus, there clearly is a circuit conflict presented by this case: Mercedes properly raised the *Noerr-Pennington* issue, the Eleventh Circuit rejected it, and other circuits would have accepted it. Particularly given the magnitude of the penalty imposed on Mercedes for exercising its First Amendment rights, review by this Court is necessary and appropriate.

C. Certification Is Necessary To Answer Important Questions Of State Law Correctly

Respondents object to certification of the important state law issues presented in this case because Mercedes did not request certification in the Eleventh Circuit. But the same objection could have been made in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974), where the Court ordered certification even though it was not requested by the parties. Moreover, there was no need for Mercedes to raise the issue for the first time in a rehearing petition because Judge Hill had already urged that the state law questions be certified and Judges Burkett and Black had refused to do so.

The state law issues that should be certified — including whether Taylor has standing to bring a claim under the Automobile Dealer's Act and whether Mercedes "violated"

that Act by filing a complaint with the DMV (Pet. App. 16a) — would, if decided in Mercedes' favor, eliminate the need to decide the significant federal constitutional issues raised by this case. The state law issues were not irrelevant to the federal issues (as Taylor tries to suggest (at 21)) and had not previously been decided by any Florida court (as MSP implies (at 24)).

As Judge Hill stated in dissent, these issues of Florida law are "important," "heretofore undecided," and dispositive (Pet. App. 16a). He therefore believed that the Florida Supreme Court should render "the first interpretation of the questions raised by th[e] relatively obscure and unclear statute" involved in this case. *Id.* at 17a. Only that court can issue a "decisive and authoritative [interpretation], one on which the people of Florida can rely." *Ibid.* And it is the people of Florida who will be affected immediately by this decision, which will have dramatic consequences for the motor vehicle industry in the State — consequences that likely were *not* intended by the Florida legislature and that likely would *not* have been accepted by Florida's highest court. See *id.* 16a-17a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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